

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs March 9, 2007

TERRY LEE NORTHCUTT v. TAMMY YVONNE NORTHCUTT

Appeal from the Circuit Court for Davidson County
No. 05D-1809 Muriel Robinson, Judge

No. M2006-00295-COA-R3-CV - Filed November 8, 2007

This appeal involves a prisoner who filed for divorce while incarcerated. After efforts to locate his wife to serve her with process failed, the prisoner resorted to service by publication and filed a motion for default judgment in the Circuit Court for Davidson County. Instead of granting the divorce, the trial court dismissed the prisoner's complaint because it was legally insufficient and because the prisoner was being assisted by a person who was not a licensed lawyer. We have concluded that the prisoner's complaint sufficiently states a claim for divorce and that the record does not support the trial court's conclusion that the person assisting the prisoner was engaged in the unauthorized practice of law. Accordingly, we reverse the trial court's order and remand the case with directions to adjudicate his complaint for divorce.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed
and Remanded**

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Terry Lee Northcutt, Only, Tennessee, Pro Se.

Tammy Yvonne Northcutt, No appearance.

OPINION

I.

Terry Lee Northcutt is a prisoner at the Turney Center Industrial Prison in Only, Tennessee. On April 27, 2003, while he was incarcerated, Mr. Northcutt married Tammy Yvonne Donahue.¹ The marriage was Mr. Northcutt's second, and Ms. Northcutt's third. The parties never cohabited as husband and wife because of Mr. Northcutt's incarceration. They likewise had no children together, they did not combine their finances, and they did not jointly own any property.

¹Ms. Donahue subsequently changed her surname to Northcutt, and we will henceforth address her as Ms. Northcutt.

Wedded bliss proved ephemeral for the Northcutts. The last time that Mr. Northcutt heard from Ms. Northcutt was on April 30, 2004. On May 13, 2005, Mr. Northcutt filed a pro se complaint in the Circuit Court for Davidson County seeking an irreconcilable differences divorce. He also filed a Uniform Affidavit of Indigency, although the record does not reveal that the trial court ever made a determination regarding his indigent status. Because Mr. Northcutt was incarcerated, he gave his power of attorney to Nancy J. Geiser to assist him in filing documents in court.

After two attempts to serve a summons on Ms. Northcutt proved unsuccessful, Mr. Northcutt, though Ms. Geiser, filed a request in the trial court for service by publication. Ms. Geiser signed the motion “Nancy Geiser for Terry Northcutt.” Accompanying the motion was a money order to cover the cost of the publication obtained by Ms. Geiser. On September 9, 2005, the trial court ordered notice by publication. The published notice stated that if Ms. Northcutt did not appear on November 7, 2005, to defend herself in the action against her, a default judgment would be entered against her.

By November 8, 2005, Ms. Northcutt had not filed an answer or otherwise made an appearance before the court. That day, Mr. Northcutt filed a “Motion for Default Divorce; to Set for Final Hearing; and to Hear Final Hearing by Interrogatories.” Accompanying the motion were an affidavit of publication executed on behalf of *The City Paper* and two sets of interrogatories – one evidently prepared by Mr. Northcutt and responded to by Ms. Geiser and one prepared and responded to by Mr. Northcutt himself. Both interrogatories explained that the marriage between Mr. and Ms. Northcutt was irretrievably broken.²

On November 18, 2005, the trial court entered an order, sua sponte, in which it determined that Mr. Northcutt’s pleadings were insufficient to afford him any relief. The court also determined that Mr. Northcutt was being represented by someone not authorized to practice law. Accordingly, the trial court dismissed Mr. Northcutt’s complaint without prejudice. Mr. Northcutt filed a Tenn. R. Civ. P. 59.04 motion which the trial court promptly denied. Mr. Northcutt has perfected this appeal.

II.

We turn first to the trial court’s decision to dismiss Mr. Northcutt’s complaint on its own motion. While trial courts undoubtedly possess the power to dismiss complaints, the power should be used sparingly. *Harris v. Baptist Mem’l Hosp.*, 574 S.W.2d 730, 731 (Tenn. 1978). When appellate courts are asked to review a peremptory dismissal of a complaint for inadequacy, they do not accord a presumption of correctness to the trial court’s action. *Conley v. State*, 141 S.W.3d 591, 594-95 (Tenn. 2004); *Stein v. Davidson Hotel*, 945 S.W.2d 714, 716 (Tenn. 1997).

The courts have no duty to create claims that a pleader had not spelled out in his or her complaint. *Donaldson v. Donaldson*, 557 S.W.2d 60, 62 (Tenn.1977). However, the courts must also refrain from exalting form over substance and must construe pleadings in light of their substance rather than their form. Tenn. R. Civ. P. 8.06; *Harris v. State*, 102 S.W.3d 587, 593 (Tenn. 2003);

²For reasons that remain unexplained, copies of a marital dissolution agreement and a final divorce decree, each listing Ms. Geiser as a party, were filed contemporaneously with Mr. Northcutt’s motion.

Mitchell v. Owens, 185 S.W.3d 837, 839 (Tenn. Ct. App. 2005); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 300 (Tenn. Ct. App. 2001). In the case of a divorce complaint, all that Tenn. R. Civ. P. 8.01 requires is that a complaint contain a short, plain statement of a claim showing the pleader is entitled to relief.

The courts also give pro se litigants without formal legal training a certain amount of leeway in drafting their pleadings and briefs. *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227-28 (Tenn. Ct. App. 2000); *Paehler v. Union Planters Nat'l Bank, Inc.*, 971 S.W.2d 393, 397 (Tenn. Ct. App. 1997). Accordingly, papers prepared by pro se litigants are measured against standards that are less stringent than those applied to papers prepared by lawyers. *Hughes v. Rowe*, 449 U.S. 5, 9-10, 101 S. Ct. 173, 176 (1980); *Baxter v. Rose*, 523 S.W.2d 930, 939 (Tenn. 1975); *Winchester v. Little*, 996 S.W.2d 818, 824 (Tenn. Ct. App. 1998).

We have reviewed Mr. Northcutt's divorce complaint, and we are unable to discern the defect or defects that caused the trial court to dismiss the complaint for insufficiency. In fact, Mr. Northcutt's petitions and motions are essentially comparable to the levels of simplicity, conciseness, and directness found in pleadings prepared and filed by lawyers. Mr. Northcutt's amended petition for divorce provides the statistical information required by Tenn. Code Ann. § 36-4-106 (Supp. 2007); it alleges grounds of irreconcilable differences; and it requests service upon Ms. Northcutt. Without question, his complaint meets Tenn. R. Civ. P. 8's requirements. Accordingly, we have determined that the trial court erred by concluding that Mr. Northcutt's divorce complaint was so insufficient that it required dismissal.

III.

The trial court also dismissed Mr. Northcutt's complaint because he was being assisted by Ms. Geiser. Ms. Geiser is not a licensed lawyer, and the trial court concluded that Ms. Geiser was engaging in the unauthorized practice of law. Accordingly, the trial court decided to punish Mr. Northcutt for Ms. Geiser's transgression by dismissing his complaint. We have concluded that the facts of this case do not warrant such drastic action against Mr. Northcutt.

Tennessee has a clear public policy prohibiting persons who are not licensed attorneys to engage in the unauthorized practice of law. Tenn. Code Ann. § 23-3-103 (Supp. 2007); *In re Burson*, 909 S.W.2d 768, 776 (Tenn. 1995). The reasons for this policy are clear. Permitting persons who are not trained in the law to advise clients with regard to legal matters endangers the personal and property rights of the public and interferes with the administration of justice. *Bar Ass'n of Tenn., Inc. v. Union Planters Title Guar. Co.*, 46 Tenn. App. 100, 125-26, 326 S.W.2d 767, 779 (1959).

Determining whether particular conduct constitutes the practice of law is often fact-intensive. *Tenn. Env't'l Council, Inc. v. Tenn. Water Quality Control Bd.*, No. M2006-00914-COA-R3-CV, 2007 WL 2917733, at *4 (Tenn. Ct. App. Oct. 3, 2007). Thus, our role, like the trial courts, is to review the facts in the record carefully to determine whether Ms. Geiser was performing services for Mr. Northcutt that only lawyers may perform. We have concluded that the record, such as it is, does not reflect that Ms. Geiser was engaging in the unauthorized practice of law.

Mr. Northcutt's access to court was hampered by his incarceration. Accordingly, he executed a broadly worded power of attorney on May 24, 2005 authorizing Ms. Geiser, a friend from high school, to act on his behalf. The record indicates that the only acts that Ms. Geiser performed for Mr. Northcutt were to sign a request for service by publication on his behalf and to provide a postal money order made payable to *The City Paper* to pay for the costs of the publication. *The City Paper* mailed a receipt to Ms. Geiser addressed to "Nancy Geiser Attorney" in the mistaken belief that Ms. Geiser was a lawyer. This record does not indicate that Ms. Geiser was holding herself out as a lawyer, and *The City Paper's* mistaken assumption that Ms. Geiser was a lawyer does not provide a sufficient factual basis for concluding that she was engaging in the unauthorized practice of law. Based on this record, we cannot agree with the trial court's decision to dismiss Mr. Northcutt's complaint because Ms. Geiser was engaging in the unauthorized practice of law.

IV.

We reverse the dismissal of Mr. Northcutt's divorce complaint and remand the case to the trial court with directions to act upon Mr. Northcutt's apparently appropriate motion for a default judgment. We tax the costs of this appeal to Tammy Yvonne Northcutt for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., P.J., M.S.